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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

HARRY P. JANNOTTI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether, given the constitutional limitations inherent in Congress' power to legislate under the commerce clause, federal jurisdiction under the Hobbs Act can be predicated upon wholly fictitious facts and circumstances which could never have had, at any time, any actual or potential effect on interstate commerce and which "facts," in any event, were formulated and injected into the transaction in question by the government?

2. Whether, under the Hobbs Act, criminal convictions for extortion can be sustained absent proof of "inducement" by the defendants charged?

3. Whether the government's conduct of the ABSCAM operation violated the most basic standards of due process and fundamental fairness, reaching and exceeding that degree of outrageousness which mandates dismissal of this prosecution?

4. Whether a "bifurcated" entrapment instruction, which submits to the jury a question of law reserved to the court, shifts the burden of proof and potentially withdraws the entrapment defense from the jury's consideration, is constitutional error which must be reversed unless harmless beyond a reasonable doubt? And if so, whether such instruction in the instant case was harmless?

5. Whether, where the evidence of governmental inducement is overwhelming, the government can meet its burden to disprove entrapment when the only proof of predisposition offered is the fact that the defendant committed the criminal act, which proof demonstrates neither his pre-existing criminal inclination nor familiarity with criminal techniques and procedures and was manufactured, in its entirety, by the government?

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner above named respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this case on February 21, 1984, Rehearing and Rehearing *en banc* denied on March 20, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, affirming the sentence of petitioner Jannotti is not yet reported. A copy of this opinion is printed in the Appendix at PA. 1.

The opinion of the United States Court of Appeals for the Third Circuit, sitting *en banc*, reversing the opinion of the United States District Court for the Eastern District of Pennsylvania, is reported at 673 F.2d 578, *cert, denied*, 457 U.S. 1106 (1982), a copy of this opinion is printed in the Appendix at PA. 47.

The opinion of the United States District Court, which was reversed by the appellate court, is reported at 501 F.Supp. 1182 (E.D.Pa. 1980). A copy of this opinion is printed in the Appendix at PA. 175.

The opinion of the United States District Court dismissing the substantive Hobbs Act charges is not reported. A copy of this opinion is printed in the Appendix at PA. 153.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, reprinted in the Appendix, at PA. 41, was entered on February 21, 1984. Petitioner Jannotti's timely filed Petition for Rehearing and Suggestion of Rehearing *en banc* was denied on March 20, 1984. PA. 42. This Court's jurisdiction is invoked under 28 U.S.C.§1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V, *reprinted at* PA. 273.

The Hobbs Act, 18 U.S.C. §1951, *reprinted at* PA. 273.

STATEMENT OF THE CASE

ABSCAM was conceived in 1978 by F.B.I. agents in New York along with career swindler Melvin Weinberg. Originally, ABSCAM was designed to recover stolen property, but it evolved into a nationwide endeavor to test the morality of targeted public officials, thus changing the government's role from that of a passive buyer of stolen property to an aggressive instigator of crime — seeking out officials and offering bribes to them.

ABSCAM was characterized throughout by strategies and government inducement — the "honeypot" according to Weinberg — designed to attract targets. Principally, the F.B.I. created the impression of an Arab sheik with vast amounts of money who spent freely with little reservation. Likewise, the F.B.I. agents repeatedly and effectively employed the concept of "the Arab mind" or "the Arab way of doing business"[1] to persuade their victims that they must accept money offered to them by the sheik to convince him of their friendship.

The government also recruited "middlemen" to assist in the scheme, among them Howard Criden, a Philadelphia lawyer who lured petitioner Jannotti into the ABSCAM net. Criden, like various other ABSCAM middlemen, was compensated by the government with contingent fees based upon the number of officials he could produce.

The Philadelphia phase of ABSCAM was authorized by the F.B.I. for a ten day period and was the last major operation conducted by the ABSCAM operatives. No infiltration or discovery of ongoing criminal activity took place, or was intended by the government, in Philadelphia. Rather, the scenario centered upon the fictitious sheik's plan to construct a fictitious $35 million hotel in Philadelphia, with its resultant fictitious major impact on the city's economy. The record, however, is devoid of

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1. See the District Court's discussion of the "Arab mind" technique and the manner in which it was employed, at PA. 197-198.

any evidence that payments of money to any city official were either sought or required or that any Philadelphia official would have had to be improperly dealt with in connection with the proposed hotel project.

With this background, the Philadelphia phase began with a series of recorded telephone calls from Weinberg to Criden, on January 18, 1980, after which Criden met in front of hidden video cameras with F.B.I. Agent Michael Wald, who posed as a representative of the fictitious sheik. Wald pressed Criden for introductions to Philadelphia municipal officials. He specifically requested a meeting with Councilman George X. Schwartz and Councilman Louis C. Johanson, Criden's law partner, despite Criden's protestations that their assistance was unnecessary given the sheik's prior relationship with two Philadelphia congressmen. Wald then unilaterally raised the issue of payments and agreed to pay Criden $10,000 for the production of Schwartz and Johanson. As of this time, Criden had never met or had any prior dealings with Schwartz.

Later that day, Johanson met with Wald. The meeting was again recorded on videotape. Johanson agreed to support the hotel project and accepted a $25,000 payment. At the end of the meeting, Wald gave Criden $5,000 and promised him "5 for the next delivery." Johanson testified that, based on his earlier meeting with Criden, he thought the payment was a retainer for legal services which his law firm would perform on the hotel project. Later and because he thought he had been duped by Criden, Johanson refused a request by Criden for an introduction to Schwartz or Jannotti since he felt they were good men whom he did not want to involve in improper activities.

On January 23, 1980, Schwartz met with Criden and Wald,[2] and at the end of the meeting, also

2. Criden had obtained an introduction to Schwartz through a mutual friend, Philadelphia Common Pleas Court Judge Thomas Shiomos. Shiomos testified that Criden told him that Criden's cli-

videotaped, a payment of $30,000 was given to Schwartz. Wald then gave Criden $5,000 for delivering Schwartz and urged Criden to deliver petitioner Jannotti.[3] Although, as with Schwartz, Criden did not know Jannotti prior to the meeting, Criden boasted on tape to Wald that he knew Jannotti well. The F.B.I. did not attempt to verify Criden's plainly false assertions of knowing Schwartz, and it did nothing to verify his equally false assertions concerning Jannotti.

On January 24, 1980, Jannotti appeared before the video cameras. At trial, there was no direct evidence against Jannotti other than the videotape of this meeting.[4] Moreover, there was no evidence that Jannotti was either under criminal investigation prior to the taping or that any investigation of him was being conducted in the time period between his being targeted for taping and the taping itself.

The videotape disclosed that on January 24, 1980, Jannotti, in the company of Criden, met Wald and Ernest Haridopolos, a second undercover F.B.I. agent, for less than an hour. During the meeting, and following an initial description by the agents of the contrived hotel

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NOTE — *(Continued)*

ents wanted to hire Schwartz as a consultant and pay Schwartz for his advice and that he, Shiomos, told this to Schwartz. Judge Shiomos testified that he saw nothing "improper or fishy" in this proposal and so advised Schwartz. PA. 205-206.

3. Also, during this meeting between Criden and Wald, Wald pressed for introductions to other city officials with whom he could "deal," naming, among others, the mayor and the former mayor of the city of Philadelphia and various councilmen.

4. In addition to this tape, the government offered against Jannotti the taped statements of Criden, Johanson and Schwartz as co-conspirator statements and an alleged false exculpatory statement. However, in none of this material is there any reliable evidence as to how Jannotti was produced or what his state of mind (predisposition) was before his introduction to ABSCAM. The Circuit Court held the admission of a substantial portion of the co-conspirator to be error, but harmless. PA. 5-16.

project, the needs of the "Arab mind" were explained to Jannotti. The government stated that the sheik insisted upon making friends and resolving problems before they arose. Indeed, Wald asserted that the "Arab mind" required that Jannotti accept the payment of money to prove his friendship and clearly implied that acceptance was absolutely necessary if the sheik was to construct the hotel in Philadelphia. The hotel project[5] was described in expansive terms, and the sheik was described as being able to finance the project himself from his incredible wealth. However, the message was always crystal clear that the project would not come to Philadelphia *if* the sheik could not make friends. Jannotti expressed interest in the project as something which would greatly benefit the City. He further stated, and repeated the statement in response to the varying approaches of agent Wald, that he would *only* support the project *because* it was legitimate and because it would be good for the City. In addition, Jannotti stated on *four separate occasions* that the proposed project was such that he would support it *without any other benefit* because of the good it would bring the City. Each time that Jannotti showed reluctance to accept any money, Wald, Criden and Haridopolos in turn increased the intensity of their pitch until ultimately Jannotti was given money by the government.

Once Jannotti left the meeting, Wald, obviously frustrated because of Jannotti's honest demeanor and lack of understanding, interest or desire for the proffered payment, spoke critically to Criden, again on tape, questioning Jannotti's willingness to participate in the transaction and speculating whether Jannotti was insulted, and Criden sought to placate him in order to insure his own bounty for having delivered a public official to the government.

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5. In an early part of the tape, Jannotti discloses that he was not aware that the fictitious project was a hotel, thinking rather that it was an apartment complex.

On February 2, 1980, in conjunction with the conclusion of ABSCAM, teams of F.B.I. agents were dispatched to conduct simultaneous interviews of the ABSCAM targets. As a result, Jannotti was interviewed by two F.B.I. agents. The interview was conducted on a premise, namely, that an ongoing investigation was underway into the activities of the sheik's representative, who had been impersonated by Wald. The interviewing agents thus sought admissions from Jannotti concerning his meeting with Wald. When Jannotti did not admit to the acceptance of money, the testimony of an interviewing agent was admitted on the theory that the interview constituted a false exculpatory statement. In the course of this testimony, however, additional facts were established. It was clear that Jannotti did not know Criden and did not know that he was an attorney. It was also established that Jannotti had not come in contact with Criden until a few hours before the meeting and that at no time was he advised in the interview that the meeting had been videotaped; hence, he was not confronted with that evidence for purposes of explaining his conduct.

Jannotti was indicted for conspiracy under 18 U.S.C. §§1951 (the "Hobbs Act") and 1962 (the Racketeer Influenced Corrupt Organizations Act or "RICO") and also for attempts to violate the Hobbs Act. The attempt charges were dismissed by the District Court prior to trial, and the government did not appeal. Jannotti and Schwartz were subsequently tried jointly on the two conspiracy counts. Following a jury trial, Jannotti was found guilty of the Hobbs Act conspiracy charge but was acquitted on the RICO count.

At trial, the government did not present one scintilla of independent proof of any actual, potential or any other effect on interstate commerce as a result of petitioner's conduct or alleged conspiratorial agreement. Likewise, the government introduced *no* evidence that petitioner sought, requested, solicited, demanded or otherwise af-

firmatively expressed the need for any payment of money in exchange for official services. Finally, the government introduced *no* extrinsic evidence of petitioner's predisposition. Both prior to trial and following the trial, the District Court held extensive hearing on the due process issues.

After verdict, petitioner moved for judgment of acquittal. By Memorandum and Order dated November 26, 1980, the District Court set aside the verdict in its entirety, dismissed the Hobbs Act conspiracy counts for lack of jurisdiction, and granted petitioner's motion for judgment of acquittal.

The government appealed the District Court's ruling and, on February 11, 1982, the United States Court of Appeals for the Third Circuit, sitting *en banc*, reversed the District Court's decision by a seven-to-two vote, and directed reinstatement of the jury verdict. Petitioner, thereafter, on April 12, 1982, filed a Petition for Writ of Certiorari with this Court, and on June 7, 1982, the Petition was denied. Following remand, the District Court imposed sentence of January 31, 1983, and Jannotti was sentenced to six months in prison and a fine of $2,000.00. Petitioner appealed the judgment and conviction, and on February 21, 1984 the United States Court of Appeals for the Third Circuit affirmed the District Court. A Petition for Rehearing and Suggestion of Rehearing *en banc* was denied on March 20, 1984.

REASONS FOR GRANTING THE WRIT

Until resolved by this Court, the critical question will always remain: will our legal system permit federal investigative and prosecutorial agencies to create and orchestrate crime, to target and then solicit their potential victims, to influence and pressure these victims by the use of substantial inducements, and to script the evidence which will be used to prosecute the victims? It is Jannotti's position that the creation of crime by the federal government is an immoral business, and given the extraordinary impact which ABSCAM has had on the national conscience, it is submitted that the controversy must be definitively resolved. For all of the reasons set forth below, granting of the writ requested is essential.

The Third Circuit's Rulings On Hobbs Act Jurisdiction In This Case Conflicts With the Rulings of Three Courts of Appeals, Adversely Impacts On All Federal Criminal Legislation Enacted Under the Commerce Clause, Misapplies Prior Holdings of This Court, and Is Erroneous Under the Facts of This Case.

The interstate commerce requirement in the Hobbs Act, 18 U.S.C. §1951, is a mandatory jurisdictional prerequisite to any prosecution under that Act. As this Court held in *United States v. Feola*, 420 U.S. 671, 695 (1975), in an analogous circumstance, "[t]he jurisdictional requirement is satisfied by the existence of facts tying the proscribed conduct to the area of federal concern delineated by the statute." In its decisions, the Court of Appeals completely disregards this fundamental concept, establishes a standard of proof which is in direct conflict with the standards employed by the Fourth, Seventh and Ninth Circuits, sustains a conviction for Hobbs Act conspiracy where no jurisdictional fact was or could have been proven, and misinterprets this Court's prior decisions in *Feola* and *Perez v. United States*, 402 U.S. 146 (1971). For these reasons and be-

cause as the Court of Appeals does recognize, a determination, in the Hobbs Act context, as to the extent of Congress' power under the commerce clause "will have ramifications for all federal criminal statutes enacted under Congress' commerce clause power," PA. 72, review of the important Hobbs Act issues raised herein is imperative.

First, in *United States v. Staszcuk*, 517 F.2d 53 (7th Cir.) (*en banc*), *cert. denied*, 423 U.S. 837 (1975), then Judge Stevens addressed the interstate commerce issue raised by the Hobbs Act, and held:

> "[T]he statutory language [of the Hobbs Act] . . . requires the prosecutor to prove some connection with interstate commerce in every case. We hold, however, that the commerce element of a Hobbs Act violation — *the federal jurisdictional fact* — may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce . . . *[J]urisdiction on the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on Interstate commerce.*
>
> *"The jurisdictional inquiry must, of course, focus on the situation at the time of the offense." Id.* at 59-60 (Emphasis added) (footnotes omitted).

Since 1975, the "realistic probability" test enunciated in *Staszcuk* has continued to be the law of the Seventh Circuit and has been adopted and uniformly applied by the Fourth and Ninth Circuits.[6]

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6. *E.g. United States v. Rindone*, 631 F.2d 491, 493 (7th Cir. 1980); *United States v. Phillips*, 577 F.2d 495, 501 (9th Cir., *cert. denied*, 439 U.S. 831 (1978); *United States v. Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976) (*per curiam*), *cert. denied*, 433 U.S. 909 (1977). Numerous other courts of appeals have referenced the *Staszcuk* formulation in passing on Hobbs Act jurisdiction issues, including the Third Circuit itself. E.g., *United States v. Cerilli*, 603 F.2d 415, 424 (3d Cir. 1979, *cert. denied*, 444 U.S. 1043 (1980).

In this case, the government created scheme upon which the ABSCAM operation was premised was wholly fictitious. Accordingly, the federal government could not and did not prove at trial that, had the scheme been carried out, interstate commerce would have been affected. Moreover, it is undisputed that no evidence other than the videotapes was introduced at trial by the government to show that the alleged conspiracy would have had any effect, actual or potential, on commerce if performed. Rather, the best the government could do was to fashion mere arguments, without any evidentiary support, appealing to the supposed common knowledge of the jury in its attempt to satisfy its burden of proving an effect upon interstate commerce.

Likewise, since the government, through its agents, had no intention of ever implementing the scheme, there never existed any possibility that the charged conspiracy would ever have had any effect upon interstate commerce. Yet, despite these undisputed facts, the Third Circuit held that where a defendant's conduct constitutes "a sufficient threat to interstate commerce so as to implicate an 'area of federal concern'," federal jurisdiction is established. Thus, in direct conflict with *Staszcuk*, the Third Circuit has wrongly substituted a wholly subjective test, which would rest federal jurisdiction upon hypothetical, imaginary or non-existent and merely argued effects on commerce.

Under the rationale of *Feola*, federal jursidiction must be predicated upon *facts*. In *Feola*, the jurisdictional nexus under 18 U.S.C. §111 is satisfied by the existence of a *fact*, the presence of a federal officer, just as federal jurisdiction under the Hobbs Act is based upon the existence of a *fact* — an effect on interstate commerce. If A and B conspire to assault X and X turns out to be a federal officer, the federal jurisdictional fact, and in turn federal jurisdiction, is present. However, if A and B conspire to assault X who they *mistakenly* believe to be a federal officer, the federal jurisdictional fact is not

present. Federal jurisdiction under a charge of Hobbs Act conspiracy can not be predicated solely upon the state of mind of the defendant; rather, it requires the proof of a fact, and measured by the *facts*, no effect on interstate commerce could have ever taken place in the instant case.

Second, permeating every aspect of this case is the uncontroverted fact of the government's instigation and scripting of ABSCAM. The federal agents thus unilaterally fashioned a scheme which they hoped would satisfy federal jurisdictional requirements. In each case relied upon by the Court of Appeals, however, the nature and extent of the conspiracy — the substance of the criminal design — was formulated by the defendants themselves.[7]

If the focus of the jurisdictional inquiry is upon the conspiratorial agreement, *see United States v. Feola, supra,* 420 U.S. at 695-96, it is both illogical and patently unfair to sanction governmental manipulation of that agreement solely to create federal jurisdiction. If the purpose of the *federal* conspiracy laws is to provide *federal* law enforcement officials with the tools necessary to combat criminal conduct in "areas of federal concern," it is likewise illogical to contend that these same officials may be given *carte blanche* to create indiscriminately what *they* believe to be an "area of federal concern" in any given case so that they may be able to prosecute it.

Whether one accepts Judge Aldisert's formulation that "A purely hypothetical effect, a fairy tale conjured by the F.B.I. . . . is not 'a sufficient threat to [commerce] so as to give rise to federal jurisdiction,' " or one employs Judge Friendly's "manufactured jurisdiction" approach, *United States v. Archer,* 486 F.2d 670 (2d Cir. 1973), the reality is that no real, actual impact on interstate commerce could have ever occurred in this case and but

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7. *See* cases cited in the opinion of the Court of Appeals at PA. 74-77.

for the government's creation and injection of an interstate element into the scheme, the federal courts would be without jurisdiction to prosecute petitioner under the Hobbs Act. This case, even more than *Archer*, epitomizes the dangerous concept of "manufactured federal jurisdiction."[8]

Third, not only does the opinion of the Court of Appeals demonstrate a complete misunderstanding of *Feola*, *see* 420 U.S. at 695-96,[9] which clearly states that a federal officer must be the subject of an agreement to assault if federal jurisdiction is to be present, but it also reflects a fundamental misperception of and a lack of respect for the essential nature of federal criminal jurisdiction. As Judge Aldisert recognizes:

> "The majority interweaves its jurisdictional argument with the argument that factual impossibility of completing a substantive offense does not bar a conviction of conspiracy. *They confuse proof of the crime of conspiracy with the jurisdictional power to punish the crime.* The presence of subject matter jurisdiction is a discrete and primary issue in each case presented to a federal court, unlike a state court. The effect on commerce is both jurisdictional and substantive in a Hobbs Act prosecution, but the

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8. In its Opinion the District Court stated:

> "Moreover, to permit this kind of artificial federalization *would efficiently remove virtually all of the limitations upon the criminal jurisdiction of federal courts, and would be utterly contrary to accepted notions of federalism.*" PA. 199-200 (Emphasis added).

9. In her Opinion Judge Sloviter remarked:

> "In holding [in Feola] that there was a 'sufficient threat' to an area of federal concern to meet the 32 jurisdictional requirements as long as a federal officer was in fact the target of the planned attack, 420 U.S. at 695, *the Court did not preclude the existence of federal jurisdiction where the intended victim is believed to be a federal officer, but in fact is not.*" PA. 78 (Emphasis added).

> two inquiries are separate and distance. *See, e.g., Feola*, 420 U.S. at 694-96." PA. 147 (Emphasis added).

Not only are the two inquiries "separate and distinct," but also the standards by which they are determined differ. Respecting proof of the substantive offense, the subjective criminal intent of an alleged Hobbs Act defendant is crucial; respecting proof of Hobbs Act jurisdiction, however, the subjective criminal intent of a Hobbs Act defendant is irrelevant. The intent of the Hobbs Act defendant can neither create nor negate the jurisdictional fact. In *Staszcuk*, then Judge Stevens understood this distinction and formulated a test which respected it. Judge Sloviter, in her opinion for the court below, paid lip service to the limitations inherent in the Constitution's grant of power to Congress to legislate under the Commerce Clause and established a test which shifts the focus of the jurisdictional inquiry away from the "existence of [real] facts" and to the subjective intent of the actor. As a result, the objective "realistic probability" test established by *Staszcuk* has been ignored by the Third Circuit and the requirement in *Feola* that federal jurisdiction be predicated on fact has been completely abrogated.

Finally, the Court of Appeals faults Jannotti for failing to present any "policy reason" for it to accept "their restrictive view" of the jurisdictional reach of the Hobbs Act. PA. 78. The policy is clear. The federal courts are a creation of the federal Constitution and of Acts of Congress, and, as such, they are courts of limited jurisdiction. Jurisdiction under the Hobbs Act is predicated on the Commerce Clause. Interference with interstate commerce must be proven *before* the federal courts may prosecute a violation of the Hobbs Act. Absent actual interference with commerce or clear proof that an actual impact on commerce would have resulted from a criminal defendant's action, the federal courts simply cannot hear the case. It is Jannotti's position that the Court of

Appeals, by its ruling, has abolished all jurisdictional limitations which heretofore existed under the Hobbs Act and has constructed a standard "which in practicality would extend federal jurisdiction over just about any robbery or extortion." *United States v. French*, 628 F.2d 1069, 1077 (8th Cir.), *cert. denied*, 101 S.Ct. 364 (1980).

A Conviction for Extortion Under the Hobbs Act Absent Proof of Inducement by a Defendant Should Not Be Permitted, and Clarification of This Issue Is Essential.

A plain reading of the definition of "extortion" in the Hobbs Act shows that proof of inducement is necessary to convict. The District Court held that the absence of proof of any express or implied demand or request for payment requires dismissal of the Hobbs Act charges. PA. 154. The Court of Appeals reversed, asserting that the law is clear throughout the circuits that proof of inducement by a public official acting "under color of official right" is unnecessary. PA. 79. Petitioner submits that both the decision of the Court of Appeals and its rationale are incorrect.

The First, Third, and Eighth Circuits have each approved jury instructions which require a specific finding of inducement.[10] In fact, except for *Staszcuk*, where insufficient detail is provided to determine whether affirmative action was taken by the defendant, and *United States v. Hedman*, 630 F.2d 1184 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), which does nothing more than cite, as "settled law," the very cases which either include evidence of inducement or approve a charge on inducement, there is no decision under the Hobbs Act involving a public official which sustains an extortion conviction absent evidence of inducements or of "initia-

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10. *See United States v. Hathaway*, 534 F.2d 386 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976); *United States v. Addonizio*, 451 F.2d 49, 59 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972); *United States v. Adcock*, 558 F.2d 397 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977).

tive and purpose," *United States v. Hyde*, 448 F.2d 815, 833 (5th Cir. 1971) (Wisdom, J.), *cert. denied*, 404 U.S. 1058 (1972), on the part of the official.[11]

In this case, it is clear that neither Jannotti, nor anyone acting on his behalf, at any time requested or demanded money in connection with the proposed construction of the hotel in Philadelphia or in exchange for petitioner's use of his official position. Rather, the evidence is clear that Jannotti was, at most, the passive recipient of money and would have supported the proposed project *whether or not* any money was paid to him.

In those cases decided under the Hobbs Act in which public officials were not defendants, the law has long been clear that, in the absence of proof that a defendant induced or intended to induce payment, the mere acceptance of a bribe does not constitute extortion or violate the Hobbs Act. *E.g.*, *United States v. Gerald*, 624 F.2d 1291 (5th cir. 1980); *United States v. Duhon*, 565 F.2d 345 (5th Cir.)., *cert. denied*, 435 U.S. 952 (1978); *United States v. Hyde*, *supra*.[12] And, as noted above, given the requirement of inducement even in official corruption cases and the fact that no case involving official corruption has ever resulted in conviction of the defendant absent proof of a request or demand, the Court of Appeals' reading of the Hobbs Act and the conclusion which it reached are clearly incorrect. Clarification of this troublesome issue is plainly warranted.

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11. "In other words, while the essence of bribery is voluntariness, the essence of extortion is duress." *United States v. Addonizio*, *supra*, 451 F.2d at 72 citing *People v. Dioguardi*, 8 N.Y. 2d 260, N.Y.S. 2nd 870, 168 N.E. 2d 683 (1960).

12. Indeed, no rational argument can be made to support divergent approaches to the Hobbs Act. As the court stated in *Hyde*, "[t]he distinction from bribery is therefore the initiative and purpose on the part of the [defendant] and the fear and lack of voluntariness on the part of the victim." *Id.* at 833.

The Government's Conduct of ABSCAM Violated the Most Basic Standards of Due Process and Fundamental Fairness, Reaching and Exceeding That Degree of Outrageousness Which Mandates Dismissal of this Prosecution

The District Court in this case applied the "demonstrable level of outrageousness" standard set down in *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring), and held that the government's conduct and activities in ABSCAM exceeded permissible limits. This record confirms that the District Court was correct. Due process in the context of criminal proceedings has received only limited treatment by this Court,[13] but numerous courts of appeal have applied due process concepts[14] and in several instances have reversed criminal convictions on this very ground.[15] Every factor found relevant to the due process analysis by every court of appeals that has ever considered the issue is present here in the extreme.

The government instigated and scripted the entire

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13. *Sorrells v. United States*, 287 U.S. 435, 459 (1932) (Roberts, J., separate opinion); *Sherman v. United States*, 356 U.S. 369, 381 (1958) (Frankfurter, J., concurring); *United States v. Russell*, 411 U.S. 423 (1973); *Hampton v. United States, supra; See Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); *Casey v. United States*, 276 U.S. 413 (1928) (Brandeis, J., dissenting).

14. *E.g. United States v. Bocra*, 623 F.2d 281 (3rd Cir.), *cert. denied*, 449 U.S. 875 (1980); *United States v. Prairie*, 572 F.2d 1316 (9th Cir. 1978); *United States v. Johnson*, 565 F.2d 179 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978); *United States v. Leja*, 563 F.2d 244 (6th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978); *United States v. Reifsteck*, 535 F.2d 1030 (8th Cir. 1976), and see cases cited *infra* at footnote 9.

15. *E.g., United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973); *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971). *See United States v. West*, 511 F.2d 1083 (3d Cir. 1975).

ABSCAM scheme. Its involvement was pervasive, and the scheme was singularly designed to lure innocent persons into its web. Indeed, no evidence of ongoing criminal conduct by Jannotti was present when ABSCAM was injected into his life, nor did any evidence exist of any prior or continuing criminal activities of this type in Philadelphia city government at the time. Jannotti did not encourage the government either to initiate or expand the scheme. He responded only to the government's repeated inducements and protestations of need, and after extreme pressure was brought to bear on him through the use of the "Arab mind" ruse and the appeal to his fundamental civic duty the hotel project to Philadelphia.

Further, the government's agents employed middlemen who were paid on a contingent fee basis, a tactic condemned by the Fifth Circuit in *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962), *on appeal after remand*, 340 F.2d 612 (5th Cir.), *cert. denied*, 381 U.S. 950 (1965). Moreover, the government was totally unconcerned with the methods and ploys used by these middlemen to convince persons to participate in the meetings, despite their knowledge of prior deception and unconscionable coaching by these very same middlemen. Indeed, neither the government nor Criden had any reason to suspect either a propensity to engage in criminal conduct on the part of Jannotti or the presence of any ongoing criminal activity involving him. Regardless of petitioner's state of mind at the time he was approached by the government, no reason exists on this record to even suggest that, absent the government's instigation in this case, Jannotti would not have lived the rest of his life as a respected and law abiding member of the community.

The Court of Appeals distorts the significance of the various aspects of the government's activities in ABSCAM by isolating them one from the other, and by failing to recognize that all of these elements, taken to-

gether, plainly demonstrate the outrageousness of the government's conduct. In *Greene v. United States*, *supra*, 454 F.2d at 787, the Ninth Circuit recognized that although

> "taken individually, none of the factors which we have pointed to as significant would necessarily require reversal of a conviction. *In our view, it is the combination which is important.*" (Emphasis added).

The totality of factors present here mandates a ruling in petitioner's favor.

Further, in its analysis of the due process question, the Court of Appeals improperly mixed concepts of entrapment and due process, failing to recognize the constitutional underpinnings of the due process defense. For example, although proof that the government had no reason for approaching a victim may be irrelevant in the entrapment context, it is and must be a factor in any due process analysis. Similarly, although in the view of the Court of Appeals the inducements offered by the government may not have been sufficient to sustain an entrapment defense, see PA. 108, these same inducements may, when viewed in conjunction with the entire scope of unfair governmental activity, be a substantial factor in supporting a due process defense.

Even if one argues, as does the Third Circuit majority, that the government may employ secretive tactics and deliberate stratagems to ferret out dishonesty among public officeholders or to detect illicit drug transactions, that argument does not sanction the government's instigation, control and total orchestration of the very criminal activity which it intends to prosecute. In every other case in which the due process defense has been raised, governmental involvement in criminal activity has been passive, and the basic criminal design has, in each instance, been conceived and carried out in all material respects by the defendants themselves.

However, in none of those cases has governmental instigation of or involvement in criminal conduct risen to the abhorrent levels which are present in the Philadelphia ABSCAM case.

First, the government designed the very nature of the fictitious scheme in an attempt to create the federal jurisdictional fact — interstate commerce — which would permit it to prosecute this case in the federal courts. In the same manner, the government, through its manipulation of its captive middleman, Criden, constructed a pattern of bribery which would not have existed but for Criden's presence throughout the scheme. Further, the conduct and language of the government's agents were deliberately ambiguous and misleading. Indeed, a review of the record will demonstrate that at no time did the government ever ask Jannotti whether the payment of a bribe was necessary. Moreover, at no point did the government seek to elicit Jannotti's understanding of the purpose of the meeting. One must conclude that the agents feared that such an explicit approach would only have resulted in the refusal of the victim they had stalked.

Finally, a review of the Circuit Court's opinion reveals a fundamental misconception of the role of the judiciary. In the view of a majority of the Third Circuit, it is *not* the judiciary's function to determine the constitutional limitations under which our law enforcement agencies are to operate. According to Judge Sloviter:

> ". . . the conduct of agents of the executive branch who must protect the public from crime is more appropriately considered through the political process where divergent views can be expressed in the ballot box." PA. 112.

The opinion of the Court of Appeals manifests a total abnegation of the judiciary's obligation to define and enforce the rights of citizens under the Constitution. As Judge Aldisert correctly recognizes in his dissent:

"[T]he philosophical difference that divides this court depends upon a judge's unspoken notions about the role of the courts. If he or she views the role of the court as a passive one, he or she will be willing to delegate the responsibility for unpopular issues to the jury and not care greatly what the result may be. If he or she views the court as an instrument of society designed to reflect in its decisions the highest values of the American legal tradition, he or she will be more likely to risk public disapproval and to measure an unpopular cause against the highest ideals and aspirations of the time.

The rights conferred upon our society by judges of the Third Article emanated from cases in which the defendants were unpopular and generally regarded as transgressors — Dollree Mapp, Danny Escobedo, and Ernesto Miranda quickly come to mind. In each case, a court, not a jury, drew the line of demarcation between permissible and impermissible police conduct to insure that enforcers of society's laws would not violate established moral frontiers while exercising their stewardship; it was federal judges, unmindful of editorials and broadcast plaudits, who chose to stand tall and unbending." PA. 126. (Footnote omitted).

If a national benchmark defining limits on federal law enforcement activity of this type is not established, no citizen can be secure from the clandestine imposition of morality tests.

The District Court's "Bifurcated" Entrapment Charge Erroneously Submitted To The Jury A Question of Law Reserved to the Court, Shifted The Burden Of Proof To The Defense, And Potentially Withdrew From The Jury Petitioner's Crucial Entrapment Defense. This Comprised Constitutional Error But The Third Circuit Abnegated Chapman's "Harmless Beyond A Reasonable Doubt" Standard.

Petitioner's trial defense was entrapment. In instructing the jury, however, the District Court erroneously charged that Jannotti had a threshold burden of proof to show government inducement before the jury was required to consider his defense. The Third Circuit found this charge to be erroneous, holding:

> "Turning to the district court's charge in the present case, we note that the court clearly stated that 'the burden is upon the Government in a case of this kind to prove beyond a reasonable doubt that there was no entrapment.' Repeatedly, however, the court indicated that the defendants had a threshold burden of showing inducement. Not only did this incorrectly divide the burden between the defendants and the government, but it also required an independent consideration of the issue of inducement, apart from the central issue of predisposition. We must therefore conclude that the district court's instruction on entrapment was erroneous." PA. 20-21.

Nonetheless, the Third Circuit further held that the erroneous charge was not reversible, ruling it harmless pursuant to its "highly probable" standard of appellate review set out in *Government of Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976), rather than the "reasonable doubt" standard established by this Court in *Chapman v. State of California*, 386 U.S. 18 (1967). The jury was thus permitted, in reaching its decision on the entrapment defense, to make a threshold finding as to whether Jannotti had met his burden of proof on induce-

ment. Of course, if the jury decided against Jannotti on this question, he was then denied consideration of his basic defense.

The Third Circuit based its decision to disregard *Chapman* on the rationale that the District Court's erroneous instruction involved a non-constitutional defense, entrapment. This holding, however, fails to address the unavoidable effect of the erroneous instruction, namely, the shifting of the burden of proof to a federal criminal defendant. Surely, a jury instruction which requires a federal defendant to meet a burden of proof to establish his right to a defense raises a basic question of constitutional proportions. *Davis v. United States*, 160 U.S. 469 (1895).

Thus, consideration by this Court is required to define the factors which trigger *Chapman* as opposed to a lesser standard. Indeed, petitioner submits that the only test for harmless error on a fundamental criminal issue should be *Chapman*, since to hold otherwise is to risk a dilution of the fundamental reasonable doubt standard.

In this case, petitioner based his trial defense on entrapment. Nonetheless, the government's careful scripting of the videotape resulted in entrapment issues of extreme difficulty. Hence, the imposition of an erroneous threshold burden of proof for Jannotti could have only risked the strong likelihood that his entire defense would never be considered. For harmless error to then be found on less than a reasonable doubt basis clearly presents the realistic probability that no fact finder ever applied a reasonable doubt standard to Jannotti's defense.

Moreover, it is also unavoidable that the erroneous instruction should have required reversal under a *Chapman* analysis.[16] Careful review of petitioner's videotape

16. *Per se* reversal is normally required when a bifurcated charge is given. See: *United States v. Watson*, 489 F.2d 504 (3d Cir. 1973); *United States v. Wolffs*, 594 F.2d 77, 79-84 (5th Cir.

reveals Jannotti's confusion, uncertainty, and concern for a legitimate construction project. Indeed, his taped reactions to the ABSCAM pitch resulted in concerns expressed by Agent Wald after the taping that petitioner was not interested in the false proposition. Clearly, under these circumstances, one cannot establish harmless error beyond a reasonable doubt.

Where the Evidence of Governmental Inducement Is Overwhelming, the Government May Not Rely Upon Evidence of "Ready Acquiescence" Manufactured by It to Meet Its Burden, Nor Can A Court Sustain A Conviction In An Entrapment Case On Proof Of Commission of the Criminal Act Alone.

Although under the law of entrapment it is the government's burden to prove predisposition beyond a reasonable doubt, the Third Circuit permitted the verdict to stand on evidence of the commission of crime alone. Predisposition is an inquiry into the defendant's subjective state of mind. "[T]he controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells v. United States*, 287 U.S. 435, 451 (1932). Subsumed within any discussion of entrapment is the intertwined relationship between inducement and predisposition. As the Third Circuit itself recognized in *United States v. Watson*, 489 F.2d 504 (3d Cir. 1973):

> "[T]he stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition." *Id.* at 511.

The extraordinary degree of government inducement in this case has already been reviewed. Given the

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1979); *United States v. Tate*, 554 F.2d 1341, 1343-1345 (5th Cir. 1977); *United States v. Ambrose*, 483 F.2d 742, 653 (6th Cir. 1973); *United States v. Dearmore*, 672 F.2d 738, 740-741 (9th Cir. 1982).

evidence of these overwhelming inducements, the government's evidentiary burden to prove predisposition was substantial. But the majority of the Circuit Court abjures any necessity to conduct a review of the entire record, despite its profession of the appropriateness of such a procedure. PA. 87-88. Instead, as Judge Aldisert points out, it satisfies itself with a rebuttal of the items relied upon by the District Court in entering judgments of acquittal. PA. 139. In so doing, the Court again relieves the government of its obligation to prove predisposition by good and sufficient evidence and effectively shifts the burden of proof to the petitioner.

Second, although appreciating that predisposition has been historically proven by, for example, proof of a defendant's prior convictions, his participation in similar transactions or proof of bad character, the Court of Appeals majority makes the startling observation that since "[s]uch evidence would be extremely difficult to produce in the case of acceptance of a bribe by a public official. . . . the very acceptance of a bribe by a public official may be evidence of a predisposition to do so when the opportunity is presented." PA. 99-100. Again, the majority of the court below states in the most blatant terms that proof of the criminal act, a fact which must be admitted of necessity by a criminal defendant if he is to be permitted to argue entrapment, is enough when it is a public official who is in the dock.

In no case in which proof of government inducement was a so overwhelming as this case has any court permitted a conviction to stand on "ready acquiescence" evidence such as presented here. Although in some situations a defendant's ready acquiescence to the government's suggestions may be enough to justify a finding of predisposition, here Jannotti did nothing tending to establish pre-existing criminal inclinations, or such familiarity with criminal techniques and procedures as to demonstrate previous experience with similar criminal activity. In short, there was no evidence to show that

when the government's overtures first came to the attention of Jannotti he was already predisposed to accepting a bribe.

It is clear that the court's rejection of the entrapment defense rests upon the notion that all petitioner had to do when offered the money was to say "No thanks." PA. 104. Such an approach to the difficult jurisprudential problem raised by this case is wholly unacceptable.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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